Waiver of The Attorney – Client and Physician-Patient Privileges

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In common with a majority of the states, Ohio has had for many years a statute providing that communications between attorney and client and between physician and patient shall be privileged from disclosure in court. Section 2317.02 of the Revised Code contains the Ohio version.[1]

By the enactment of Amended House Bill No. 576, effective October 13, 1953, the 100th General Assembly amended this portion of Section 2317.02 to read as follows: (amendment in italics):

> Sec. 2317.02 (11494). The following persons shall not testify in certain respects:
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> (A) An attorney, concerning a communication made to him by his client in that relation or his advice to his client; or a physician, concerning a communication made to him by his patient in that relation, or his advice to his patient; but the attorney or physician may testify by express consent of the client or patient, *or if the client or patient be deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of such deceased client or patient;* and if the client or patient voluntarily testifies, the attorney or physician may be compelled to testify on the same subject; . . .

The old statute presented some difficulty in application. Ohio stands with the large number of courts which have held that a litigant can complain on appeal of the erroneous admission of privileged matter over his objection, although he is not the client or patient, and in no way represents him.[2] The argument that he had no standing to complain does not seem to have been presented squarely to the Ohio courts, and is not discussed. Legal writers, who have severely critized the whole idea of these privileges for many years, have criticized also this position as to the reviewability of their denial. In jurisdictions which retain them, the aim of these privileges is now usually said to be: to encourage the client or patient to make full and free disclosure to his attorney or physician of facts necessary to proper advice, without fear that any humiliating, degrading or incriminating ones will be later disclosed in

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[1] Formerly OHIO GEN. CODE § 11494. The other state statutes are collected in 8 WIGMORE, EVIDENCE §§ 2292 n., 2380 n. (3d ed. 1940); Note, 52 COL. L. REV. 383 (1952).

[2] Swetland v. Miles, 101 Ohio St. 501, 130 N.E. 22 (1920); Weis v. Weis, 147 Ohio St. 416, 72 N.E. 2d 245 (1947); and see State v. Karcher, 155 Ohio St. 253, 98 N.E. 2d 308 (1951).

court to shock his feelings or injure his reputation.[3] Here and there the rule is, logically, limited to such facts[4], but most statutes give the client or patient an abundance of encouragement by assuring him that nothing of these communications will, without his consent, be revealed in court by the professional adviser (either directly, or indirectly by disclosure of the advice given).

In this respect the true privilege differs from the great body of evidentiary rules of exclusion or preference, such as the hearsay rule or best evidence rule. The latter are intended to aid the ascertainment of the truth, by allowing the litigant to protect himself against the admission of evidence which is insufficiently reliable, or prejudicial, or productive of delay or confusion. The rules of privilege here considered obviously do tend to suppress the truth, but this sacrifice is thought (in those states which retain them) to be outweighed by a need to encourage the communications involved.

Wigmore and some courts have pursued the above statement to the conclusion that since the rule of privilege is for the benefit of the client or patient, only he can claim it as a matter of right.[5] A litigant, as litigant, has a right to the enforcement of those rules of exclusion and preference designed to ascertain the truth, but unless he is also the patient or client, no right to the enforcement of the rule of privilege. He may suggest its application on behalf of the client or patient, but if the trial judge, even erroneously, refuses to exclude the privileged matter, the litigant cannot complain on appeal. A majority of courts, however, have further allowed the litigant who suggested the privilege to complain on appeal where the privilege is erroneously denied, even when he is not the patient or client.[6] This result seems to be due not alone to a "sporting theory of justice," as some critics suggest. The litigant has no

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[3] McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEX. L. REV. 447 (1938).

[4] PURDON'S STATS. 1930 (Penna) tit. 19, § 686 (facts "which tend to blacken the character of" the patient); N.Y. CIV. PROC. ACT § 354, ("which would tend to disgrace the memory of the decedent.").

[5] Associates Discount Corp. v. Greisinger, 103 F. Supp. 705 (W.D. Pa. 1952); In re Fay's Estate, 31 Erie 353 (Pa. Orph. 1949); Yarborough v. Yarborough, 202 Ga. 391, 43 S. E. 2d. 329 (1947); Martin v. State, (Miss.) 33 So. 2d 825 (1948), and see Vance v. State, 182 Miss. 840, 183 So. 280 (1938); Hier v. Farmer's Mut. Fire Ins. Co., 104 Mont. 471, 67 P. 2d 831, 110 A.L.R. 1051 (1937); 8 WIGMORE, EVIDENCE §§ 2196, 2321, 2386 (3d ed. 1940); Note, 2 A.L.R. 2d. 645 (1948); Note, 30 COL. L. REV. 686 (1930). Ohio seems to take this view as to the privilege against self-incrimination, Orum v. State, 38 Ohio App. 171, 175 N.E. 876 (1931), but ordinarily no problem of protecting an absent holder of this privilege arises.

[6] The cases are collected in 8 WIGMORE, EVIDENCE, §§ 2196, 2321, 2386 (3d ed. 1940).

interest, as litigant, in the sustaining of the privilege, but when the client or patient is absent, the concededly erroneous failure of the trial court to apply the privilege must be corrected at the instance of some one else, or not at all. In addition, the unfortunate casting together in the statutes of rules of exclusion regulating the competency of witnesses, and rules of privilege, have tended to result in confusion as to the function of the two.

In this situation the problem of who may waive the privilege assumes large importance, particularly after the death of the client or patient, who could waive it while alive. Faced with their views that any litigant, even the adversary of the successors of the deceased, may complain on appeal if the privilege is erroneously denied, unless waived, and with the client or patient prevented by death from deciding whether to waive, the majority of courts have held that the privilege may be waived by his executor, administrator, next of kin, heir, or legatee, who is considered as standing in his place.[7] Some statutes expressly so provide, but the same result has been reached in states where the statute speaks of incompetency,[8] where there is no provision for waiver,[9] and even where the statute expressly provides some other waiver and omits this one.[10]

For a time at least, Ohio stood with the small minority of states rejecting the above view and holding that if the client or patient died without having waived the privilege, the right to waive did not pass to any successor.[11] The statute did not make any mention of this contingency.

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[7] Stayner v. Nye, 227 Ind. 231, 85 N.E. 2d. 496 (1949); Martin v. Shaen, 22 Wash. 2d. 505, 156 P. 2d. 681 (1945); Denny v. Robertson, 352 Mo. 609, 179 S. W. 2d 5 (1944); Boyles v. Cora, 232 Ia. 822, 6 N.W. 2d. 401 (1942); In re Cunningham's Estate, 219 Minn. 80, 17 N.W. 2d. 85 (1944); Harvey v. Silber, 300 Mich. 510, 2 N.W. 2d. 483 (1942). Earlier cases are collected in notes, 31 A.L.R. 168 (1924); 126 A.L.R. 381 (1940).

[8] Ex parte Gfeller, 178 Mo. 248, 77 S. W. 552 (1903) (attorney-client); Stayner v. Nye, 227 Ind. 231, 85 N.E. 2d 496 (1949) (physician-patient); Denny v. Robertson, 352 Mo. 609, 179 S.W. 2d. 5 (1944) (physician-patient); Gorman v. Hickey, 145 Kan. 54, 64 P. 2d. 587 (1937) (physician-patient).

[9] Thompson v. Ish, 99 Mo. 160, 12 S. W. 150 (1899); Groll v. Tower, 85 Mo. 249; Stayner v. Nye, *supra*, n. 8.

[10] Harvey, v. Silber, 300 Mich. 510, 2 N.W. 2d. 483 (1942); In re Gallun's Estate, 215 Wis. 314, 254 N. W. 542 (1934).

[11] Swetland v. Miles, 101 Ohio St. 501, 130 N. E. 22 (1920); Haley v. Dempsey, 14 Ohio App. 326 (1921); Auld v. Cathro, 20 N. D. 461, 128 N.W. 1025 (1910); Loder v. Whelpley, 111 N.Y. 239, 18 N.E. 874 (1888) (prior to statutory changes); In re Hunt, 122 Wis. 460, 100 N.W. 874 (1904) (prior to statutory changes); Watkins v. Watkins, 142 Miss. 210, 106 So. 753 (1926) (prior to statutory changes); Harrison v. Sutter Street Ry. Co., 116 Cal. 156, 47 Pac. 1019 (1897) (prior to statutory changes.).

Other jurisdictions having this rule have found it unsatisfactory. In New York (the pioneer state of the physician-patient privilege), California, Michigan, Mississippi, and Wisconsin, various forms of waivers after the death of the holder of the privilege have been provided by statute.[12] In other states contrary early constructions have been expressly or impliedly eliminated.[13]

In 1936 the Ohio Supreme Court, in *Industrial Commission v. Warnke*,[14] ruled that the widow of the deceased workman, in a proceeding to recover industrial compensation, could waive the physician-patient privilege as to communications between the husband and his doctor, over the objection of the other party. The language of the decision, while referring to the case at hand, was broad enough to suggest that the earlier construction would be rejected in other types of actions and by other representatives of the deceased as well.[15]

No further clear opportunity to elucidate its position came to the Supreme Court,[16] and the courts of appeals have divided on the effect of the *Warnke* decision.[17]

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[12] N. Y. Civ. Proc. Act § 354; Calif. Code Civ. Pro. § 1881; Mich. Stat. Ann. § 27.911; Miss. Stat. 1944, c. 315, p. 540; Wis. Stats. 1949 § 325.21.

[13] Kern v. Kern, 154 Ind. 29, 55 N. E. 1004, (1899) overruling Gurley v. Park, 135 Ind. 440, 35 N. E. 279 (1893), and see Stayner v. Nye, 227 Ind. 231, 85 N. E. 2d. 496 (1949) for further changes.

[14] 131 Ohio St. 140, 2 N. E. 2d. 248 (1936).

[15] The dissenting judges so considered it; and see the note in 7 Ohio Op. 568, treating the Warnke case as overruling Swetland v. Miles, n. 2, *supra*.

[16] In Weis v. Weis, 147 Ohio St. 416, 72 N. E. 2d. 245 (1947), a will contest between the designated heir and the legatees of testator, the heir introduced over the legatee's objection hospital records covering testator's illness and containing matter allegedly privileged as a doctor-patient communication.

Rejecting the legatee's appeal, the court held that the hospital records did not contain privileged matter and for an alternative ground of the holding said: "Furthermore, the contestees called the attending physician, a witness to the testator's will, as a witness at the trial, and he testified fully on all matters covered by the hospital records. We think this constituted a waiver of any privilege and the contestees are estopped to claim any." This holding was not carried into the headnotes. Since the court had long held that testator's making his physician a subscribing witness was an express waiver as to matters concerning the validity of the will, it is not clear whether this statement shows a disposition to depart from the older cases and allow waiver by a legatee in a will contest. Cf. Russell v. Penn. Mut. Life Ins. Co. 70 Ohio App. 113, 41 N. E. 2d. 251 (1941) (introduction by beneficiary of life policy, of evidence on the same matter is ineffectual as a waiver — only express consent by the patient could so operate).

[17] Dougherty v. Hall, 70 Ohio App. 163, 45 N. E. 2d. 608, 612 (1942); McKee v. New Idea, 36 Ohio L. Abs. 563, 44 N. E. 2d. 697 (1942); Pariskey v. Pierstorff, 63 Ohio App. 503, 27 N. E. 2d. 254 (1940); Colwell v. Dwyer, 20 Ohio Ops. 320, 35 N. E. 2d. 789 (Ohio App. 1940).

The present amendment to the statute makes clear that waiver is possible by the surviving spouse or executor or administrator. Since the legislature rejected an amendment designed to permit the executor or administrator to waive only if there were no surviving spouse, it seems clearly intended that either may waive without the concurrence of the other.[18] The specific designation of the persons entitled to waive will eliminate the difficulties found in some states in determining who is a "personal representative" of the deceased.[19]

Another question may arise under the new wording. Ohio holds that a written waiver by a patient, inserted in an application or contract for insurance, is effective to remove the bar of the statute after his death.[20] Also, if a client makes his attorney a subscribing witness to his will, this waiver is effective after his death.[21] Does the 1953 amendment continue this rule, adding another waiver to it, or does it mean that after his death the new alternative: "or if the client or patient be deceased, by the express consent of the surviving spouse or the executor or administrator..." is the *only* form of waiver which will be effective, and prior express waivers by the deceased do not apply?

In New York, which had previously held no waiver possible after the death of the client or patient, the legislature provided that "...a physician...upon a trial or examination may disclose any information...when the provisions of [the privilege statute] have been expressly waived upon such trial or examination by the personal representatives of the deceased patient."[22]

In *Holden v. Metropolitan Life Ins. Co.*[23] the New York Court of Appeals held that policy provisions for waiver are ineffective when the patient has died:

> ...Under the statute as amended, no one except the personal representatives of the deceased patient can waive...and it can be waived by them only upon the trial or examination where the evidence is offered or received.

It seems unlikely that the Ohio legislature intended to make such a change without using more specific language;[24] and it did

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[18] House Journal, 100th General Assembly, June 10, 1953, p. 7.

[19] In re Kings Will, 251 Wis. 269, 29 N.E. 2d. 69 (1947); In re Faiher 239 App. Div. 246, 268 N. Y. Supp. 120 (1933); In re Ackermann, 163 Misc. 624, 298 N. Y. Supp. 38 (Surr. Ct. 1937); Thompson v. Smith, 103 F. 2d 936, 126 A.L.R. 382 (Ct. App. D. C. 1939).

[20] New York Life Ins. Co. v. Snyder, 116 Ohio St. 693, 158 N. E. 176 (1927).

[21] Knepper v. Knepper, 103 Ohio St. 529, 134 N. E. 476 (1921).

[22] N. Y. CIV. PROC. ACT § 354.

[23] 165 N. Y. 13, 17, 58 N. E. 771, 772 (1900).

[24] E.g., MINN. STAT. ANN. § 595.02: "... The beneficiaries shall be deemed to be the personal representatives of such deceased person for the purpose of waiving the privilege hereinbefore created, and no oral or written waiver

not expressly require waiver to be "upon such trial or examination," which phrase was stressed by the New York court. Wisconsin and Mississippi have had statutes more similar in this respect to the Ohio waiver provision for many years.[25]

The Wisconsin provision, enacted in 1921, reads: (after providing for express waiver):

> ... or in case of [the patient's] death or disability, of his personal representative or other person authorized to sue for personal injury or of the beneficiary of an insurance policy on his life, health or physical condition.

In *In Re Peterson's Estate*,[26] the testator's will, making his physician an attesting witness, was made in 1940. It was offered for probate by one legatee. At a hearing on objections to probate raised by testator's brothers and sisters, also legatees, it was held that the waiver thus made by testator operated after his death to render the physician's testimony unprivileged when called by the proponent. The court's discussion on this point said:[27]

> The contestants contend that Dr. Schneider was by reason of the provisions of sec. 325.21 incompetent to testify to the execution of the will and the condition of the patient. It satisfactorily appears from the record that Dr. Schneider signed the will as an attesting witness at the request of the testator. It is well established that where a testator requests a physician to become a witness to his will he thereby waives any privilege which would otherwise exist between him and his physician.

Although the precise argument is not discussed, this case would seem to be persuasive as to the effect of the Ohio amendment.

The statute unfortunately does not provide for waiver by next-of-kin, heirs, legatees, or beneficiaries of insurance contracts. In a will contest, for example, between an executor and an heir-at-law, where there is no surviving spouse, the very question to be decided is which of these two is really the "successor" of the deceased patient or client. To limit the power to waive the privilege in such a case to the executor will sometimes, by making possible the exclusion of material which would bring out the facts, decide in advance the crucial point.

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of the privilege hereinbefore created shall have any effect except that the same be made upon the trial or examination here the evidence is offered or received; . . ."

[25] MISS. STAT. 1944, Mar. 31, C. 315 p. 540: ". . . or in case of the death of the patient, by his personal representatives or legal heirs in case there be no personal representative."; WIS. STAT. 1949 §§ 2325.21 325.22, quoted in the text, *infra*.

[26] 250 Wis. 158, 26 N.W. 2d 553 (1947).

[27] *id.*, at 164, 26 N.W. 2d 553, 556 (1947).

As previously shown, the majority of jurisdictions have resolved the question in favor of bringing out all the facts by holding that where all parties claim under the decedent, either the privileges do not apply,[28] or that any party may waive, over the objection of others.

If the Ohio Supreme Court was in process of holding some of the previous decisions erroneous, and harmonizing construction of the statute with the more widely accepted position, the fact that the amendment does not cover the entire field may not prevent completion. The fact that the Legislature has failed to enact provisions calling for more liberal waiver than the 1953 Amendment, and subsequently enacted Amended H.B. No. 576, does present a hurdle.[29] But other courts have held that express statutory provision for one or more forms of waiver did not limit waiver to the statutory forms and situations alone.

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[28] Gaines v. Gaines, 207 Okl. 619, 251 P. 2d. 1044 (1953).

[29] The Ohio Bar Association proposal is an example; it was introduced in the 98th General Assembly as H. B. No. 151, and died in committee.